No. 11,194

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

PETITION FOR REHEARING

Upon Appeal from the District Court of the United States for the District of Arizona

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I.

STATEMENT OF THE CASE ON REHEARING

The case has been reversed and sent back to the District Court for a new trial on the major issue that tender of consideration is required under the California decisions, or what the Circuit Court of Appeals states is "constructive fraud"; and the theory of the appellees being that it is misrepresentation. We believe that the issues have been narrowed down to very few major propositions and we think that the Honorable Circuit Court of Appeals erred, and that the reasons are covered by the assignments of error and propositions of law hereinafter set out.

It is clear from the opinion of the Court that the Circuit Court of Appeals bases its decision on the question that the plaintiffs-appellees based their theory of the case on actual fraud. On page 4 of the opinion, the Court says:

> "From the above summary and from an inspection of appellees' complaint, certain matters are made abundantly clear. Appellees based their right of recovery and their right to avoid the purported effect of the said release upon a showing at the trial of *actual fraud* practiced by appellant's agents."

On page 5 of the opinion, the Court says:

> "There can be no doubt that both pleadings and proof of appellees made the existence or non-existence of actual and intentional fraud the paramount and decisive issue in this case. It is also clear that appellees relied on the charges and proof of actual fraud to void the release."

On page 6 of the opinion, the Court says:

> "Instructions of the foregoing character leave no doubt that the trial court was clearly of the view that appellees had undertaken to rest their case upon the theory and proof that actual and intentional fraud had been practiced upon them which finally resulted in the execution of the release relied upon by appellant."

On page 7 of the opinion, the Court says:

> "It seems clear to us that in giving this (plaintiff's requested) Instruction No. 2, the court completely parted company with the trial theory of appellees under which they rested their right of recovery on a showing of actual fraud. This instruction dealt with *constructive* fraud. It clearly authorized the jury to

find for appellees if constructive fraud was shown by the evidence to have characterized acts of appellant's agents."

With the great deference due the Honorable Court, we humbly believe that the Court might be mistaken, and as Al Smith said, "Let's look at the record."

As we set forth on page 2 of our brief, the complaint set forth three causes of action or statements of claim. The first statement of claim does not anticipate the defense of a release and for the purposes of the action was the only statement of claim that it was necessary to set forth, and it sought only the recovery of the damages for the injury to the femur or thigh bone of the plaintiff, Zoa H. Zane.

The second statement of claim or cause of action, like the first, sought recovery only for the injury to the thigh bone or femur and alleged *actual fraud* and misrepresentation on the part of the defendant, its agents and servants. (Italics supplied.)

The third statement of claim is similar to the first statement of claim and sought damages only for the injury to the fractured femur or thigh bone, but did not allege actual or intentional fraud; and the third statement of claim is based upon misrepresentation on the part of the defendant, its agents and servants, and what the Circuit Court of Appeals terms "constructive fraud." It will be borne in mind that the plaintiffs sought in all their theories of the case only damages for the fractured femur bone and not for the amputation of the leg below the knee.

From the pleadings and evidence three theories of the case were submitted to the jury under proper instructions:

First: ACTUAL FRAUD AS TO THE FACTS AND MISREPRESENTATION AS TO THE PHYSICAL CONDITION OF ZOA H. ZANE WHICH LED THE PLAINTIFF TO SIGN THE RELEASE.

Second: EVIDENCE AS TO THE SUBSTITUTION OF RELEASES (IN FACTUM). THAT THE PLAINTIFFS-APPELLEES SIGNED A DIFFERENT RELEASE FROM THE ONE THAT WAS LEFT WITH ZOA H. ZANE AT THE HOSPITAL, BY THE CLAIM AGENT, MR. CAMERON.

Third: MISREPRESENTATION WITHOUT PROOF OF ACTUAL FRAUD AND COVERED BY THE PLAINTIFFS-APPELLEES' REQUESTED INSTRUCTION NO. ", AND THE INSTRUCTION IN WHICH THE CIRCUIT COURT OF APPEALS SAYS THAT THE PLAINTIFFS-APPELLEES PARTED COMPANY WITH ACTUAL FRAUD.

The theory of actual fraud as to the facts and the theory as to misrepresentation were submitted to the jury under the pleadings and were covered thereby. The theory of the substitution of releases (fraud in factum) was developed by the evidence largely by counsel for the defendant, as the record will hereafter show. This theory is permissible without being made an issue by the pleadings, under Rule 54(c) of the Federal Rules of Civil Procedure, which provides:

> "* * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in its pleadings or in the alternative, plaintiffs could have proved the substitution of releases based upon the first statement of claims as it did not antici-

pate a release and no reply had to be made to new matter under the Federal Rules of Civil Procedure."

It will be noticed from the time Mr. Carson, of counsel for the plaintiffs, made his opening statement (Tr. 78-84) that the plaintiffs relied on all three theories of fraud, and not one time in the record does it show that the plaintiffs ever wavered on these theories. Any question of tender had nothing to do with the case in so far as the law of California was concerned, but we did argue as a collateral proposition that even under the California cases the plaintiff was entitled to recover even without tender, which will be argued hereafter.

II.

ASSIGNMENTS OF ERROR

The Honorable Circuit Court of Appeals erred in reversing the case and granting a new trial for the following reasons:

1. The Court erred in holding that the plaintiffs-appellees based their case entirely on the question of actual fraud.

2. The Court erred in holding that the trial court erred in giving appellee's requested Instruction No. 2.

3. The Court erred in holding that it was necessary to tender back the consideration received by the appellees before suit could be maintained, as the question of tender of consideration was governed by the law of Arizona, being the law of the forum, and not the law of California, and that no tender had to be made before suit could be maintained in Arizona.

4. The Court erred in holding that the various theories of the plaintiffs-appellees below were inconsistent.

5. The Court erred in not holding that the general verdict in favor of the plaintiffs, where there was no request for special findings, was not conclusive of all the issues in the case.

III.

PROPOSITIONS OF LAW

1. The plaintiffs-appellees did not base their case entirely on the theory of actual fraud, but relied on misrepresentation (what the court terms "constructive fraud"), and actual fraud as to the facts in securing the plaintiffs-appellees to sign the release in question, and actual fraud (in factum) as to the substitution of releases.

2. The question of rescission and tender of consideration was governed by the laws of Arizona, and not of California, but no tender of consideration had to be made in order for the plaintiffs to maintain the suit.

3. Even under the California cases, plaintiffs could maintain the suit without rescission.

4. Plaintiffs-appellees were not compelled to elect on any theory in which to bring the suit, but could bring the suit on any theory under the new Federal Rules of Civil Procedure, and a general verdict in favor of the plaintiffs is conclusive upon the defendant.

5. There is sufficient evidence on all issues of fraud to support the verdict in favor of the plaintiffs.

ASSIGNMENT OF ERROR NO. I

and

PROPOSITION OF LAW NO. I

The plaintiffs - appellees did not base their case entirely upon misrepresentation, what the Court terms "constructive fraud," but based their case upon (1) three theories of fraud, (2) misrepresentation as to facts, and (3) actual fraud as to the facts and fraud (in factum) in the substitution of releases.

It is true, as set forth in the opinion, that the plaintiffs did plead in their complaint that they were unable to make tender of any consideration received but before the final submission of the case to the jury counsel for the plaintiffs being aware of the legal proposition that the question of rescission and tender of consideration was governed by the laws of the State of Arizona (law of the forum), and basing their theory of recovery that the damages sought was for separate and distinct injuries that had been settled for, the plaintiffs withdrew requested Instruction No. 7. Therefore, the question of tender of consideration was not submitted to the jury in any form and completely abandoned by the plaintiffs and was not considered by the jury in their determination of the issues, resulting in a verdict for the plaintiffs. It was the contention of the plaintiffs at the trial and at every stage of the proceedings that they could rely on any theory of the case, even though inconsistent, as will be argued hereafter.

It will be remembered that Mr. Carson argued the proposition of law before the Circuit Court of Appeals in the oral argument and gave the Circuit Court of Appeals the citation to 53 C.J. 1244, where the rule is laid down that the question of rescission and tender of con-

sideration is governed by the law of the forum. Perhaps we took too much for granted, but in submitting the case to the jury the plaintiffs-appellees knew that the question of rescission and tender of consideration was governed by the law of the forum, and this was a primary reason in asking for Instruction No. 2, which is based upon the Arizona case of *Atchison, Topeka and Santa Fe Ry. Co. v Peterson,* 34 Ariz. 292, 271 P. 406. If the plaintiffs had abandoned the question and theory of misrepresentation, certainly, they would not have requested Instruction No. 2 which is based upon the legal postulate that if Dr. Blackman and the claim agent, Mr. Cameron, were the agents of the defendant, and made false representations to the plaintiff as to the condition of Zoa H. Zane, that the plaintiff could recover although no wrongful intent on the part of the agents was intended to deceive the plaintiff. Of course, it is rather hard to distinguish in any case the border line between false misrepresentation and actual fraud. As we argued in Proposition No. III in our brief, beginning with page 13, that the evidence is clear and beyond question that the representations made by the agents of the defendant were believed and relied upon by the plaintiff, and that the plaintiff would not have executed the release if she had known of the fracture to her thigh bone or femur. See statement of facts in plaintiffs' case on pages 3, 4, 5, and 6 of plaintiffs' brief.

It is clear from the statement of this evidence that Mr. Cameron and Dr. Blackman represented to the plaintiff that her only injury was the injury below the knee and that she would be able to wear an artificial limb, and that she would be a normal person. Because the evidence

did show actual fraud as to the facts, certainly, the plaintiff did not abandon the theory of misrepresentation. This is clearly shown for the reason that the court modified defendant's requested Instruction No. 3 by the insertion of the word "intentional" in Instruction No. 3, modifying the instructions as to intentional fraud. The record shows that the defendant knew that the plaintiff relied both upon intentional fraud as to the facts and as to the substitution of releases and as to false representation. It will be noted that the Court instructed upon both actual fraud as to facts and on the question of misrepresentation, plaintiffs' Instruction No. 2, and we submit that the record shows that the plaintiff relied upon both actual fraud in securing the execution of the release and actual fraud in the substitution of the release and relied upon misrepresentation without proof of actual fraud. It will be noted in T.R., P. 445, that Mr. Baker in his motion for a directed verdict, at the close of all the evidence, argued that there was neither evidence sufficient to show constructive fraud or intentional fraud and we herewith quote from the T.R.:

> "* * * three, that there is no evidence (402) showing any intentional fraud upon the part of the defendant; four, that there is no evidence showing any constructive fraud on the part of the defendant; * * *". (Underscoring supplied.)

The defendants, in their brief on P. 35, Proposition No. II, argued that there was no sufficient evidence to show actual or intentional fraud, and the defendant-appellant also argued that there was no competent evidence as to constructive fraud, beginning with p. 30 and beginning with p. 42, defendant's Propositions I and III,

so it is clearly shown from the record that the plaintiffs did rely upon all theories of fraud, actual and constructive, and this is also shown by the position taken by the defendant-appellant. So we think that the court is in error in saying that the plaintiff relied on actual fraud, but we think the record shows, beyond any doubt that the plaintiffs did not limit their case to the theory of actual fraud.

It will be noticed that Mr. Baker, counsel for the defendant, in his exceptions to Instruction No. 2 did not except on the ground that the question of tender was governed by the law of California, but his exception stated that the plaintiffs "seek to recover on several different theories. This instruction makes no distinction between theories * * *" (Tr. 460). It will be noted that Mr. Baker's reply brief was based on one proposition, not a question of tender, but a question of ratification by the retention of the consideration an undue length of time. This was the basis of the defendant's whole case in reply. We do not believe that the record shows at any place that Mr. Baker contended that the law of California governed as to tender of consideration.

ASSIGNMENTS OF ERROR NOS. II and III
and
PROPOSITION OF LAW NO. II

The question of tender is governed by the law of the State of Arizona (the law of the lex fori), and not of California; and therefore, as no tender had to be made before trial, the Circuit Court of Appeals was in error in holding that the law of California governed as to rescission and tender.

We come now to the major proposition in the case, which is the question of rescission and tender of consideration. The Court in its opinion on page 8 says:

"This instruction on constructive fraud is therefore erroneous in that nothing is SAID THEREIN RESPECTING THE NECESSITY FOR RESCISSION OF THE RELEASE CONTRACT AND RESTITUTION OF THE CONSIDERATION PAID THEREUNDER." (Underscoring and capitalization supplied.)

Plaintiffs' requested Instruction No. 2 was taken from the *Atchison, etc., Ry. Co. v. Peterson,* 34 Ariz. 292, 271 P. 406, and the Court in the Peterson case instructed the jury that if the agent-physician of the defendant made representations to Peterson as to his condition that the plaintiff could recover even if the physician believed the statements to be true and it was later discovered that they were false. This was the theory in the case at bar. This was the reason for plaintiffs' requested Instruction No. 2.

The Question of Rescission and Tender of Consideration Is Governed by the Law of the Forum

The rule is laid down in 53 C.J. 1244, sec. 65, notes 27 and 28:

"The effect of the failure of a releasor to restore the consideration before bringing suit is governed by the lex fori and not by the law of the state where the release was executed."

This note cites the case of *St. Louis-San Francisco Ry. Co. v. Cox,* 171 Ark. 103, 283 S.W. 31. In the Cox case, supra, the plaintiff, Lulu M. Cox, was injured while a passenger on the train of the St. Louis-San Francisco Ry. Co. She signed a release on the representation of a physician-agent of the company as to her injuries and

she relied on the representation of the physician-agent. She brought an action to set aside the release on misrepresentation. The appellant carrier requested an instruction that before she could recover she must tender the consideration received before the action could be maintained. The injury happened in the State of Missouri, and under the laws of the State of Missouri, before the plaintiff could maintain the action she would have to tender the consideration received. The suit was brought in the State of Arkansas against the carrier. The court rightfully held that while under the Missouri law it was necessary to tender consideration before suit could be maintained that the question of rescission and tender of consideration was governed by the law of the forum, and where the remedy was sought (lex fori) and we quote as follows from 5 R.C.L. P. 917, Sec. 11:

> "The broad, uncontroverted rule is that the lex loci will govern as to all matters going to the basis of the right of action itself, while the lex fori controls all that is connected merely with the remedy."

We have literally searched every case in the digests, after checking with West Publishing Company up to the time of printing this petition we have been unable to find a single case to the contrary of the rule laid down at 53 C.J. 1244, supra, and we do not believe that there is in the entire field of legal jurisprudence. Inasmuch as the question of the instruction was governed by the law of the forum, the Arizona law applies. Under the celebrated case of *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 Law Ed. 1188, 58 Sup. Ct. 817. The Supreme Court of the United States in overruling *Swift v. Tyson,* 16 Pet. 1, 18, 10 L.Ed. 865, holds that the Federal District Court

takes judicial knowledge of the law of Arizona and will apply the law of Arizona, and the question of tender being governed by the law of the forum, was purely an Arizona question. The Supreme Court of Arizona in passing upon this question has held point blank that under no consideration is it necessary to tender to the defendant the amount received in settlement under the release before suit must be instituted. In the case of *Southern Pac. Co. v. Gastelum,* 36 Ariz. 106, 283 P. 719, 722, the Supreme Court of Arizona held where a release was procured by fraud it was not necessary to tender the amount received before filing suit. In the *Gastelum case,* supra, the court said:

> "He did not return or tender the $350 to defendant before filing suit, and because of this failure the latter contends that he cannot avoid the effect of the release or settlement on the ground of mental incapacity, ignorance, or illiteracy at the time the release was executed and therefore that its demurrer should have been sustained. Following the weight of authority, we have recently held that repayment of the consideration paid for a release secured through fraud, or a tender thereof, is not a condition precedent to the right to institute or maintain an action to recover the damages suffered in an accident occurring during one's employment. *Atchison, Topeka & Santa Fe Ry. Co. v. Peterson* (Ariz.) 271 P. 406, 410. The grounds upon which this principle rests are applicable here, and we think sound. They were stated in this language: '*Some of the decisions base their ruling upon the ground that it would be useless to require a tender where it would be refused, as in the case of the releasee who claims that the release is valid, while others place it upon the ground that the restora-*

tion of that which one is entitled to retain in any event either as a result of the agreement sought to be set aside or of the original liability, is never required." (Italics supplied.)

The reasoning of the *Cox case,* supra, to our mind, is unanswerable. The Court says:

"See, also *Kilgo v. Continental Casualty Co.,* 140 Ark. 336-343, 215 S.W. 689.

(1) Under the doctrine of the above cases it is not a condition precedent to the maintenance of this action by the appellee that she tender to the appellant the consideration received by her for the execution of the release. In other words, in this jurisdiction the failure of tender is a matter that does not reach to the basis of the right of action itself. It is not a matter of substance relating to the right to maintain an action, but pertains only to the procedure or remedy.

" 'The broad, uncontroverted rule is that the lex loci will govern as to all matters going to the basis of the right of action itself, while the lex fori controls all that is connected merely with the remedy.' 5 R.C.L. p. 917, Sec. 11."

It may be true in some of the cases in California that the question of rescission and of tender of consideration is the part of the substantive law of California before suit can be maintained, but certainly it could not have any extra-territorial effect. This question is answered in the Cox case, supra, p. 35, as follows:

"But under our decisions, as above stated, a failure to refund or make tender of the consideration for the release in such cases relates only to the remedy, and is not a matter of substance pertaining to the right

of action itself. It is a universal rule that laws relating to the remedy can have no extra-territorial effect. As is said in 5 R.C.L. 941, Sec. 28: *'It is a universally established rule that the affording of remedies in one state for enforcing a contract made in another depends entirely upon judicial comity, and that the remedies and procedure are therefore governed entirely by the lex fori. Considering the matter apart from the principle of comity, there is not the same reason for looking to the intent of the parties in the case of the remedy as in the case of matters pertaining to the substance, for the parties do not necessarily look to the remedy when they make the contract.'* " (Italics supplied.)

Clearly, inasmuch as the question of tender of consideration is governed by the laws of Arizona, the law of the forum, of which both the District Court of the United States and the Circuit Court of Appeals of the United States will take judicial knowledge under the case of *Erie R. Co. v. Tompkins,* supra, we believe the Circuit Court was in error in holding that the law of California governed as to return of consideration.

The rule laid down in the case of *St. Louis-San Francisco Ry. Co. v. Cox,* supra, is reiterated in 11 Amer. Juris., Conflict of Laws, p. 408, Sec. 120, and is cited as a leading case on the question.

> "In the consideration of the matter apart from the principle of comity or other principles discussed heretofore, there is not the same reason for looking to the intent of the parties in the case of the remedy as in the case of matters pertaining to the substance, for the parties do not necessarily look to the remedy when they make the contract."

11 *Amer. Juris., Conflict of Laws,* 408, 409:

> "They bind themselves to do what the law they live under requires; but as they bind themselves generally, it may be taken as if they had contemplated the possibility of enforcing it in another country."

11 *Amer. Juris., Conflict of Laws,* 409. See Note 17:

> "*St. Louis-San Francisco R. Co. v. Cox,* 171 Ark. 103, 283 S.W. 31, citing R.C.L.; *Johnson v. Jones,* 62 Ind. App. 4, 112 N.E. 830, citing R.C.L."

The District Court of the United States under the case of *Erie R. Co. v. Tompkins,* supra, will take judicial knowledge that the law of Arizona is that no rescission or tender of consideration has to be made before suit can be maintained.

20 *Am. Jur. Evidence,* page 62, Sec. 39, says:

> "State Laws in Federal Courts—The reciprocal relations subsisting between the several states and the United States are domestic, not foreign, and since the state courts are judicially cognizant of the Federal Constitution and of the public acts of Congress, the general rule is that the United States courts will, when exercising original jurisdiction, take judicial notice of the public laws and jurisprudence of all the states and territories. This rule has found wide and uniform application and is well intrenched in our system of jurisprudence."

See cases cited under 20 *Am. Jur. Evidence,* p. 62, note 8; *Hogan v. O'Neill,* 255 U. S. 52, 65 L.Ed. 497; *Pure Oil Company v. Minnesota,* 248 U. S. 158, 63 L.Ed. 180. See also annotation on this question *Adam v. Saenger,* 82 L.Ed. 655. This is the rule in the Ninth Circuit. *Mutual Life Insurance Co. v. Hill,* 97 Fed. 263.

In an action for injuries sustained in a railroad accident in Indiana, instituted in a Federal Court sitting in Ohio, such court will take judicial notice, without pleading or proof, of the applicable laws of Indiana. *Baltimore & O. R. Co. v. Reed* (1915; C. C. A. 6th) 223 F. 689, 10 N. C. C. A. 107 (Writ of certiorari denied 239 U. S. 640, 60 L.Ed. 481, 36 S. Ct. 160).

Inasmuch as the question of rescission and tender of consideration was governed by the laws of Arizona, it was not necessary to tender the consideration before suit could be maintained, and the giving of Instruction No. 2, requested by plaintiffs-appellees, was not error.

Inasmuch as it was not necessary to tender any consideration before maintaining suit the only remaining question is, did the plaintiffs have to give credit on the judgment for any amount received. In the *Peterson case,* supra, there were no separate and distinct injuries and the suit was based upon one injury, and the court did instruct the jury that it should give credit to the defendant for the amount paid. This is not true in the case at bar. The plaintiffs did not bring an action for the recovery for any damages for the amputation below the knee, but only for the injury to the femur or thigh bone, for which she was not paid. This being true she did not have to tender any consideration. We here again reiterate the rule stated on page 47 in our brief:

> "The rule is stated in 53 C.J. 1237 as follows:
>
> 'The consideration for the release need not be returned where an action is brought upon a claim not in contemplation at the time of the execution of the release.' "

The case of *Malloy v. Chicago Great Western R. Co.,* 185 Iowa 346, 170 N.W. 481, is very clear on this point, as where the parties seek damages for consequent injuries necessarily excluded in computing the consideration paid for the release, or for specific injuries other than that on which the action is based. Nothing could be clearer than this. See authorities cited on pp. 47 and 48 of plaintiffs' brief. In the case of *Jordan v. Guerra,* 23 Cal.(2d) 469, 144 P.(2d) 349, it is held point blank that wherein release was obtained by fraud and that the rule of rescission and return of consideration was not required where a person seeking to avoid the release had been deceived into signing a different release than he thought he was executing and that the settlement would only go to the matters on which the minds of the parties met. In the case at bar the plaintiffs-appellees were induced to sign a different release than they thought they were signing. And on the theory of substitution of releases the release signed by Zoa H. Zane and her husband is absolutely void and no tender of the consideration is required. And plaintiffs boldly take the position that they can recover on any theory whether the release is treated as void or voidable, and that the plaintiffs are not required under the new Federal Rules of Civil Procedure to stick to any particular theory. In the case of *Backus v. Sessions, et al.,* 17 Cal.(2d) 380, 110 P.(2d) 51, it is held that where a party suffered cuts and bruises under the eye that it did not cover injury to the optic nerve which the plaintiff did not know at the time of executing the so-called release, and that no tender of the consideration was required. Where the evidence showed that the party executing the release was not competent when he signed the same be-

cause of his physical and mental condition and his release was void. In the case of *Raynale v. Yellow Cab Co. et al.,* Cal., 300 P.(2d) 991, it is held that there is no need for the tender of consideration but the release does not cover the damages sought. In the case of *Tyner v. Axt,* Cal., 298 P. 537, it is held that where a release was obtained by fraud, where it was represented that the release covered only medical expenses, it was held that no tender of the consideration was required. In the celebrated case of *O'Meara v. Haiden,* 204 Cal. 354, 268 P. 334, being an action for the death of plaintiff's minor son as a result of being hit by the defendant's automobile, that at a time when deceased had apparently recovered from his injuries and neither plaintiff nor defendant contemplated the death of plaintiff's son, and plaintiff signed a release discharging defendant from all liability for any injuries suffered by plaintiff as a result of the accident. Subsequently, the son died as a result of the effect of an attack of measles upon an unrevealed injury to his spleen suffered when he was knocked down by defendant's car. In discussing the necessity of plaintiff's restoring the consideration received for the release prior to the institution of the present suit, the Court said:

> "That the present action in principle is much like the case of *Meyer v. Haas,* 126 Cal. 560, 58 P. 1042."

In that case the Court held the release only covered what the parties intended it to cover and that no tender of the consideration was required. There was no claim that there was any fraud in the case of *O'Meara v. Haiden,* supra, but the reason the Court held that there was no necessity for the tender of the consideration was that

the release covered a separate and distinct injury than the one sued for. While in this case, also, the Court did hold that if a tender of consideration was made at any time before trial it was sufficient. Although the Court held point blank that no tender of the consideration was necessary where the release covered a separate and distinct injury. The case cites the celebrated case of *Bliss v. N. Y. etc., Railroad,* 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504, that holds no tender of consideration was necessary when the release covers separate and distinct injuries. And also cites the celebrated case of *Lumley v. Wabash R. Co.* (C.C.A.) 76 F. 66, Sixth Circuit, in which Judge Lurton, who is also a Judge of the Supreme Court of the United States, in an opinion concurred in by Judge Taft, (later President and Chief Justice of the United States) and Judge Hammond, another famous Judge, held that no tender of consideration had to be made for something that was independent of the release and not covered by the action. It would seem that the *Lemley case* is a fairly respected authority. It is a universal principle of equity, as held in the case of *Smith v. Atchison, T. & S. F. R. Co.,* 232 S.W. 290, Texas:

> *"That 'one is never obliged, in an action for rescission, to restore that which in any event he is entitled to retain either by virtue of the contract sought to be set aside, or of the original liability."* (Italics supplied.)

Certainly, there is no better known fundamental principle of equity jurisprudence than the above statement. Zoa H. Zane and her husband signed a release for the injuries for the amputation below the knee and not for any injuries to the femur. And, when the action was in-

stituted in Arizona, the plaintiffs did not have any property right or chattel that belonged to the defendant and not bound to return it in any event. And as held in the *Peterson case,* supra, and the *Gastelum case,* supra, by the Supreme Court of Arizona they were not bound to return the money in any event. The above reasoning is one of the further reasons that the plaintiffs withdrew Instruction No. 7, and after the withdrawal of this instruction, the case of *Berry v. Strubble,* 20 Cal. App.2d, 299, 66 P.2d, had no relationship to the case at bar. The case of *Matthews v. Atchison, T. & S. F. Ry. Co.,* 54 C.A.(2d) 549, 129 P. 435, which is squarely in point in the case at bar and the *Peterson case,* supra, and the *Cox case,* supra, holds that the case of *Berry v. Strubble,* supra, does not apply in a fact situation in such a case as the one at bar.

On the question where there is separate and distinct injuries and a settlement is made for a separate and distinct injury and where a releasor intending to release only a portion of his claim, signs an instrument which in fact releases in full because of fraudulent representation, is confined to the portion of the claim which the holder intended to settle. Return of the consideration will be dispensed with and that they only intended to settle that portion of the claim which they had in mind. The editor of A.L.R. in an able discussion of this principle says, at 134 A.L.R. p. 15:

> *"The principle in question is, however, applicable in certain situations in which the distinction between fraud in the inducement and fraud in the execution would be unavailing. Thus, in a case where no fraud was shown but it was proved that through a mutual*

mistake the holder of a claim, intending to release only a part thereof, actually executed a release in full, it could not be held that, upon the ground of fraud in the execution of the release, no return of the consideration paid was necessary, but it could be said that, since the releasor intended to release a portion of his claim and affirmed the release to that extent, he was entitled to the consideration paid him therefor and it was not necessary that he return such consideration as a condition to the avoidance of the release on the ground of mistake.'' (Italics supplied.)

No tender of a consideration was required under the famous case of O'Meara v. Haiden, supra. It will be noted that 53 C.J. 1237, Note 15, cites the case of O'Meara v. Haiden as a case which is an exception to the general rule that tender of consideration has to be made before the institution of suit, on the theory that a suit is brought on a claim not within the contemplation of the parties at the time of the execution of the release.

And it will be noted further that it does not discuss the question of tender at all or tender at any particular time. While it is true in the case of *O'Meara v. Haiden* that tender was made at the time of trial and the Court held that this was proper, at no time did the Court say that tender was required at all. In fact, the second syllabus of the case in 268 Pacific Reporter, at Page 334, holds point blank that it was not necessary to rescind, release and restore consideration before instituting suit. Case after case is cited where no tender of consideration was required. After citing a large number of cases, on Page 337, the Court reasons that the case of *O'Meara v. Haiden*

is alike in principle to the case of *Meyer v. Haas,* 126 Cal. 560, 58 P. 1042, and the Court says:

> "The present action in principle is much like the case of Meyer v. Haas, except that no fraud is claimed or proven to have been practiced by the defendant in the procurement of the release involved herein."

It would be rather illogical to argue in one breath that the case of *O'Meara v. Haiden* was like *Meyer v. Haas* on principle where no tender of consideration was required at any stage of the proceedings, and then in another breath argue that tender of consideration was required. It is true in the case of *O'Meara v. Haiden* that it announces the rule generally that under the California law on misrepresentation where the suit is not brought for a separate and distinct injury or partial release, that tender of consideration has to be made, but we submit that there is no authority that holds that under the case of *O'Meara v. Haiden* that any consideration has to be made in a separate and distinct injury such as the case at bar. And it might be noted that this is the opinion of the Editor of A.L.R. on the case of *O'Meara v. Haiden,* 134 A.L.R., Page 95. Certainly if the editors of Corpus Juris and A.L.R. state the principle of *O'Meara v. Haiden* that under *O'Meara v. Haiden* no tender of consideration is required, then we submit that writers of legal jurisprudence of this type are entitled to some consideration; and if under the law of *O'Meara v. Haiden* no tender of consideration was required, the plaintiffs did not have to tender under the California law. The reason that we have stressed this argument so much is not that tender had to be made according to the law of the forum, but on the theory that

no tender was required in Arizona or California, or any other place, for separate and distinct injuries even on any theory where the release was void or voidable.

When the appellant and defendant below in their examination by making out the release as substituted and introducing the same in evidence brought the case squarely within the rule of the cases cited on Page 34 of the brief of the appellee, that is, when in the release there is a particular recital that is followed by general words, the general words are limited and restricted by the particular recital, and this is especially true where the general words are printed and the particular recitals are written in. For the convenience of the Court we herewith again recite:

53 C.J., pages 1241, 1242, par. 61;
45 Am. Jur., pages 693, 694, par. 29;
Texas E. P. R. Co. v. Dashiell, 198 U. S. 521, 49 L.Ed. 1150; 25 S. Ct. Rep. 737;
Union Pac. R. Co. v. Artist, 60 Fed. 365, 23 L.R.A. 581 (C.C.A. 8th Cir.);
Lumley v. Wabash R. Co., 76 Fed. 66 (C.C.A. 6th).

It will be noted that the words in this case were partly written and partly oral, as testified to by Zoa H. Zane, and on this theory only covered the injuries that were specified in the release, as was intended, and did not bar an action for an injury to the femur, and no tender had to be made.

When the defendant introduced its Exhibit E in evidence, T.R., p. 177, showing the release as it was when it was left with Zoa H. Zane at the hospital, then the defendant brought the case squarely within the *Dashiell case,* supra, decided by the Supreme Court of the United

States, and established beyond any doubt the theory of the plaintiffs on the substitution of releases.

A party who introduces a written document is conclusively bound by the document as cited in the case of *McClung Const. Co., Inc. v. Langford Motor Co.,* Court of Civil Appeals of Texas, 33 S.W.2d 749, and the Court in this case says:

> "(3) In 10 R.C.L. p. 1098, par. 289, it is said: 'Conclusiveness against Party Introducing Document.—As a general rule documentary evidence is held to be conclusive against the party introducing it. He may not impeach it, and he will not be permitted to accept a part which is in his favor and repudiate another part which is opposed to his claim or defense. And this applies as well to documents forming a part of a record of a cause as to other documents.'
>
> "In 17 Ann. Cas., p. 381, note, it is said:
>
> 'As a general rule documentary evidence is held to be conclusive against the party introducing it. He may not impeach it, and he will not be permitted to accept a part which is in his favor and repudiate another part which is opposed to his claim or defense.' "
>
> Certainly, the defendant cannot object on the ground of inconsistency of causes of action when the defendant proved the substitution of releases beyond any reasonable doubt. And if there was any error in claiming actual fraud, which these plaintiffs stoutly deny, then the error was invited by the defendant, and it cannot complain thereof. From the foregoing cases it will be seen that under no theory on this earth, under the ruling of the Arizona courts were the

plaintiffs compelled to tender any consideration before instituting action in Arizona.

PROPOSITION OF LAW NO. III

Even under the California cases plaintiff could maintain the suit without rescission

It will be seen from the previous argument on Assignment of Error No. 2, and Proposition of Law No. 2, that even under the California cases, the plaintiffs did not have to tender consideration before bringing the action, as from the proof, the release was void on the theory in *O'Meara v. Haiden,* supra, that the release covered separate and distinct injuries from the one sought in this suit.

ASSIGNMENT OF ERROR NO. IV
and
PROPOSITION OF LAW NO. IV

The court erred in holding that the various theories of the plaintiffs-appellees were inconsistent, so as to prevent recovery under the few Federal Rules of Civil Procedure, and a general verdict in favor of the plaintiffs is conclusive upon the defendant.

As we have heretofore shown the Court, the case went to the jury on two theories covered by the pleadings: *one,* actual fraud and misrepresentation that induced the plaintiffs to sign the release; *two,* misrepresentation induced by Dr. Blackman and Mr. Cameron based upon misrepresentation, although the representations of Dr. Blackman and Mr. Cameron were believed by them (Dr. Blackman and the claim agent, Mr. Cameron); *three,* fraud in the substitution of releases. The third theory was not covered by the pleadings but was covered by Rule 54(c) as set forth in the Federal Rules of Civil Procedure even

if it is not covered by the pleadings. It might be noted on the third theory that counsel for the plaintiffs did not know nor did the plaintiffs know that there had been a substitution of releases until they saw the release introduced in evidence that set forth the sum of $15,967.00, defendant's Exhibit B, T.R., p. 143. It will also be noted that plaintiffs in their second and third statement of claim stated that a release had been signed containing the sum of $14,500.00 and covering the injuries below the knee. It might also be noted here, as we argued in our brief, that the expenses in the hospital for care of Zoa H. Zane was on a day to day basis and the defendants could not have possibly known the exact amount to fill in the release until the day settlement was made. We might note here that Rule 54(c) was made to cover situations exactly like the one in the case at bar.

Plaintiffs-appellees were not compelled to elect on any theory and could bring the suit on any theory that was proved by the pleadings in the evidence under the new Federal Rules of Civil Procedure and the general verdict in favor of the plaintiff was conclusive upon the defendants. The Court reasons on p. 10 of its opinion that the jury was at liberty to find a general verdict for the appellees which could have rested on testimony which fell short of establishing the existence of actual fraud, but did prove or tend to prove the existence of constructive fraud. The Court further reasons that the presence of conflicting instructions provides no assurance that the error did not affect the jury verdict, and at best the jury was left to take its choice between two inconsistent theories of recovery. We admit that the plaintiffs could have rested their case on so-called constructive fraud as

termed by the Court, covered by Instruction No. 2. Plaintiffs' theory of misrepresentation based upon the *Peterson case,* supra, and the general verdict would stand as it was based upon proper evidence and covered by the proper instructions and we also state that the jury could have based its verdict upon actual fraud in the substitution of releases. Also, we might state here that the new rules of the Federal Rules of Civil Procedure were made to cover a fact situation like this one in the case at bar.

Under the new Federal Rules of Civil Procedure, Rule 8(a), plaintiff may file in one complaint, a statement of claim in the alternative, a claim or claims even though they be inconsistent and he cannot be compelled to elect on which claim he stands. In the case at bar no motion for election was made. Not one single objection was made in the trial that required election. The courts have uniformly held that even if a motion for election was made no election could be compelled to elect between the different statements of claim, although they be inconsistent.

See, *Fidelity Deposit Company v. Krout,* Cir. Ct. of Appeals, 146 Fed.2d 531, also, *Reconstruction Finance Corp. v. Goldberg,* C.C.A., 143 F.2d 752.

Certainly, it was the purpose in adopting the new Federal Rules of Civil Procedure to cover a situation exactly like this. Surely, the plaintiffs did not have to content themselves with any theory or any particular theory.

In *Kraus v. General Motors,* 27 F. Supp, 537, in passing upon a motion to require the plaintiffs to elect the Court said:

> "Turning to the second remedy applied for, and in connection therewith, Rule 8(a) (3) of the Federal Rules of Civil Procedure states in part as follows:

'Relief in the alternative or of several different types may be demanded.' ''

At the Proceedings of the Institute on Federal Rules, Dean Charles E. Clark stated, with reference to this rule that:

"As a matter of fact, all that should be expected of either party or his attorney, is that he tell what he knows about the case, the accident or the breach, or whatever happens, and that he shall not be required to pick and stick to one theory of law or one theory of fact, only to find when he gets to trial that he has chosen the wrong one."

The Court further says in *Kraus v. General Motors,* supra:

"The Court is entirely in accord with the above, and is of the opinion that plaintiff need make no election at this time because of the inconsistency of his causes of action. Rule 8 is very clear and definite on this point. The case of *Marie Catanzaritti, etc. v. Lina Bianco,* D.D. 25 F. Supp. 457, decided November 28, 1938, by Watson, D.J., may serve to elucidate the Rule. In that case, it is said that: 'Under the present practice there is no objection to an action which proceeds on inconsistent theories entitling the Plaintiff to different remedies, depending on which theory is established. A party may set forth two or more statements of a claim alternately or hypothetically and may state as many separate claims as he has regardless of consistency and whether based on legal or on equitable grounds or on both (Federal Rule 8(e) (28 U.S.C.A. following section 723c)), and relief in the alternative or of several different types may be demanded.' ''

For an able discussion of the question under the new Federal Rules of Civil Procedure see the case of *Reconstruction Finance Corporation v. Goldberg,* 7th C.C.A., 143 F.2d 752, where an action was brought on three theories and the Court held that the plaintiff could not be compelled to elect any particular theory to prosecute his action and after discussing the question the Court quotes from Rule 53(c). Quoting from this case as follows:

> "It will be noted that plaintiff alleged three theories upon which it sought to fix defendant's liability; (1) as a shareholder in the trust; (2) as a partner; and (3) as a trustee. Defendant makes much of the point that the Court erred in denying his motion to require the plaintiff to elect on which of these so-called inconsistent remedies it predicated its right to recovery. We think there is no merit in this contention. We doubt if plaintiff by such allegation was pursuing inconsistent remedies. After all, the main question for decision was whether defendant was the real or beneficial owner of the bank stock, and the most that can be said of the complaint is that it stated different theories on which such ownership might be shown. But even though inconsistent remedies were alleged, such practice is permissible under the Federal Rules of Civil Procedure. Rule 8(e) provides:
>
> " 'A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both.'
>
> "On the other hand, a number of courts have decided against defendant's contention. *Ottinger v. General Motors Corp.,* D.C. F. Supp. 508; *Kraus v.*

General Motors Corp., D.C., 27 F. Supp. 537; *Munzer v. Swedish American Line, et al.*, D. C., 30 F. Supp. 789. Furthermore, Rule 54(c) provides:

"'* * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in its pleadings.'"

Certainly, under the above authority, the plaintiff could rely on any theory covered by the pleadings or evidence and it would stand. We think that the Court erred in its reasoning that the jury could take its choice between two so-called "inconsistent theories of recovery." The plaintiffs could recover on any theory or theories even if they were inconsistent. This was the very purpose of adopting the new Federal Rules of Civil Procedure, and as reasoned by Dean Charles E. Clark, now judge of the Second Court of Appeals, the plaintiffs were not required to pick or stick to any one theory of law or fact, only to find that when they went to trial that he had chosen the wrong one. Inasmuch as the Court properly instructed the jury on all theories the plaintiffs can recover on any one theory.

ASSIGNMENT OF ERROR NO. V
and
PROPOSITION OF LAW NO. V

The general verdict in favor of the plaintiffs where there was no request for special findings was conclusive on all issues in the case.

The defendant could have required a special findings but did not request any, and he is certainly bound by the

general verdict of the jury, and the legal presumption is that a verdict is always favored and that any theory or theories supported by the evidence is proper. Inasmuch as the law of tender of consideration was governed by the laws of Arizona, the law of the forum, and not California, and there being abundant evidence on any theory to support the verdict of the jury on any theory, the verdict must stand. The Court further says on pages 10 and 11 of the opinion:

> "Had there been a special or fact-verdict, or if the general verdict had been coupled with answers to fact-interrogatories clearly indicating that the general verdict was rested on proof of actual fraud, we would know to a certainty that giving the instruction on constructive fraud was harmless error. As it is, we are unable to determine and therefore cannot say that it affirmatively appears from the whole record that giving these inconsistent instructions was harmless error."

The answer to this is that the defendant did not request any special findings and it was not necessary for the jury to determine any theory of fraud, and certainly there could be no error in giving the instructions which the Court terms "inconsistent". While before the adoption of the new Federal Rules of Civil Procedure, these theories might have been termed inconsistent, under the new Federal Rules of Civil Procedure, they are permissible, and certainly, the defendant is bound by a general verdict on any theory. See also the case of *Fidelity Deposit Company v. Krout*, 146 F. 531.

Under Rule 18(a) the plaintiff in his complaint can join with independent or alternate claims, either legal or

equitable or both, as he may have against the other party and it is not ground for misjoinder as it was before the adoption of the new Federal Rules of Civil Procedure. See commentary from 45 W. Va. L. Q. 5 in *U. S. Code Annotated,* Vol. 28, p. 508, and where the parties are the same there is no restriction as to joinder of any type of claims or as to any number of claims, especially where they arise out of the same transaction, occurrence or series of transactions. Discussion is very enlightening, and the commentary is, in part:

> "As to joinder of causes of actions, the new rules introduce what might be said to be a novel principle. They proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common. They therefore permit the joinder of practically anything, and the court is allowed in its discretion to make an order for the separate trial of any matters which can be more conveniently tried that way. This, of course, eliminates a great field of discussion and argument over technical points respecting joinder." 45 W. Va. L. Q. 5.

In the case of *Betts et al., v. Gahagan et al.,* 212 F. 120, Fourth C.C.A., it is held:

> "APPEAL AND ERROR (Sec. 930)—VERDICT—PRESUMPTIONS. Where the pleadings raised two issues, and on the trial one was supported by evidence, and the other not, a favorable verdict will be sustained on appeal on the presumption that the jury based its verdict on the issue supported by the evidence."

In the case of *Cross v. Ryan,* 124 F.2d 883, 884, C.C.A. Seventh Circuit, certiorari denied, 62 Sup. Ct. 1269, 316 U. S. 1269, 86 L.Ed. 1735, it is held that:

> "Where each count in complaint was held to have stated a cause of action, if there was substantial evidence to sustain any one count in favor of plaintiffs, the general verdict would be upheld.
>
> "The Circuit Court of Appeals, in determining sufficiency of evidence to support causes of action stated in complaint, does not weigh the evidence or pass upon the credibility of the witnesses, but looks only to substantial evidence that supports the verdict."

See *Hellier's Estate,* Cal. 145 P. 1008:

> "General verdict in evidence where several issues are tried is submitted to the jury, a general verdict must stand if the evidence on one alone is sufficient to sustain it."

In the case of *Sessions v. Pac. Improvement Co.,* 206 P. 653, Cal., it is held that where it is a case submitted to the jury on two counts and there is evidence to support either, the verdict must stand.

Where a case is submitted to the jury on different theories the verdict will not be set aside because different inferences could have been drawn from the verdict. See *Apache Ry. Co. v. Shumway,* Ariz. 158 P.2d 142.

As we have heretofore reasoned, the Court always on appeal, resolves any presumption in favor of the verdict that is rendered. As reasoned in the case of *Betts, et al., v. Gahagan, et al.,* supra.

We think that it is unquestionably true that there is ample evidence from the record, as we have heretofore

argued, to support the verdict on any theory, and that the defendant having failed to request any special findings is bound by the verdict and the presumption is that the verdict is supported by any theory proved by the pleadings and evidence.

The case of *Aaronson v. City of New Haven,* 94 Con. 690, 110 A. 872, 12 A.L.R. 328, is a case of what the courts would call a dark horse case, and to our mind is very apropos even under the new Federal Rules. Certainly if the defendant wants a case submitted to the jury and wants findings on any particular issue, it should request special interrogatories as provided by the rules; and this case holds, citing other cases and followed by other cases, that where a case is submitted to a jury on different counts or different theories and there is evidence to support one and not the other, and in the absence of á request for special findings where there is a general verdict the presumption is that the jury based its verdict on the proper theory and the proper proof. On this question the Court says in the Aaronson case:

> "Another question remains to be considered. As already stated, the verdict was a general one, and it imports that the jury has found all the issues for the plaintiff. One good and sufficient specification of negligence, to wit, that the defendant neglected to remove the obstruction within a reasonable time after notice, was alleged and supported by credible testimony, and the damages to be awarded are no more or no less, whether one or both issues of negligence were found for the plaintiff That being so, the verdict must stand. (Citing cases.) As was said in Foster v. Smith, 52 Conn. 451: 'If the evidence justified the verdict on either defense, the judgment must

stand. That it was sufficient to sustain the defense of payment, we have already seen. We have no occasion, therefore, to inquire whether it was sufficient to sustain the finding that there was no new promise to pay the debt. For the same reason it is hardly necessary to inquire whether the charge on that question was correct.'

"In such cases the defendant may protect itself from any possible injustice, when the complaint contains two or more counts, by asking for a separate verdict upon each count, or, when two or more issues are presented in one count, by asking the court to propound special interrogatories to the jury." (Italics supplied.)

We believe that the error in not requesting special findings, as held in the *Aaronson case,* supra, and the fact that a general verdict was rendered, that the general finding is conclusive on the defendant. In the case of *Miller v. Advance Transp. Co.,* 126 F.2d 442, certiorari denied, 317 U. S. 641, 63 Sup. Ct. 32, 87 L.Ed. 516, the Court of Appeals of the Seventh Circuit passed squarely on a similar question, and held that even if there was error in submitting the case to the jury on one theory of negligence and there was evidence of other theories that the jury could find that the case would be affirmed. It seems to us that this case is squarely in point, especially in view of the fact that no request was made for special findings, and it would certainly seem that under the new Federal Rules of Civil Procedure, and since certiorari was denied by the Supreme Court of the United States, that even if there was error in submitting the case to the jury, which the plaintiffs most vehemently

deny, then the case should be affirmed on the theory that the general verdict is conclusive.

The question is further answered in the case of *Foster v. Moore-McCormack Lines,* 131 F.2d 907, certiorari denied, 318 U. S. 762, 63 S. Ct. 560, 87 L.Ed. 1134, wherein the celebrated Judge Frank said:

> "There was a general verdict, and such a verdict 'throws its mantle of impenetrable darkness over the operations of the jury.' Appellant might have dissipated that darkness by asking, under Rule 49, Rules of Civil Procedure, 28 U.S.C.A. following section 723c, for a special verdict or for a general verdict accompanied by the jury's answers to interrogatories. * * * unless the trial judge or one of the parties invokes Rule 49. But that wise rule, which would ensure keeping the jury in its proper place, is, for some dark reason, seldom used."

Another interesting case which we think bears on the question is the case of *Beau v. Western N. C. Ry. Co.,* 12 S. E. 600, wherein an action by a railway employee for personal injuries wherein defendant pleaded a release, instead of a single issue as to the validity of the release the court submitted to the jury three issues, viz: whether the plaintiff executed the instrument thinking it was a receipt for wages, whether at the time the release was obtained plaintiff was suffering bodily pain and mental anxiety due to his injuries, and whether by reason of such suffering he was unable to comprehend the effect of the release. It is held that the procedure was not prejudicial to the defendant. It seems to us that in the case at bar when the jury determined all the issues, the defendant could not be prejudiced.

We submit that even if there was error, which these plaintiffs most stoutly deny, that a general verdict and finding on any particular theory was conclusive, and the cases cited by the Court on page 11 of the Opinion would have no application, because in these cases no question of inconsistency in the rule or in theories applied. But inasmuch as there was no error in any of the instructions, certainly the verdict must stand.

On p. 11 of the Opinion, the Court cites three criminal cases and one civil case on the question of giving inconsistent instructions. Of course, if inconsistent instructions are given which are not in accordance with law, then we would say that it would be error, but where instructions are given, though inconsistent in theory, under the new Rules which are proper, we can hardly see where they would be considered erroneous unless we misunderstand the meaning of the new Rules. The case is cited by the Court on p. 11 of the opinion, *Bollenbach v. United States,* 326 U. S. 607, was a case where the Court gave improper instruction on consideration on the question of possession of stolen property. In the *Bihn v. United States,* 328 U. S. ...., June 10, 1946, case the Court gave a prejudicial instruction on the question of conspiracy to violate a gasoline rationing statute. In the *Ah Fook Chang v. United States,* 9 Cir., 91 F.2d 805, case the Court gave an erroneous prejudicial instruction under the narcotics law. In the *Lynch v. Oregon Lumber Co.,* 9 Cir., 108 F.2d 283, case the court gave, in an action for negligence in the Oregon law, an improper instruction and a mingled comment on the evidence. Admittedly in these cases the instructions were prejudicial, but we can hardly see the application to the case at bar as the plaintiffs have a right to try their case on inconsistent theories under the new Rules.

IV.

CONCLUSION

We are not unmindful of the great care and patience and long months of study which the Court has given to this case, but may we kindly suggest with due deference to this great and honorable Court that due to the fundamental error in holding that the question of tender was governed by the law of California and not holding that no tender was required where there was a separate and distinct injury or a partial release, according to the cases we have cited we believe that the case must be affirmed on rehearing. Certainly the Court does not mean to limit the plaintiffs to any one theory, and under the opinion of the Court as it stands the plaintiffs would be required to proceed on one theory of the case, and this is not in accordance with the new Rules, because it is apparent from the facts that the plaintiffs are not in a position to tender the consideration in order to proceed under the California theory of mutual mistake or what the Court terms constructive fraud, or even actual fraud. And without proper direction it would be dangerous for the plaintiffs to proceed, because if it is true that the question of tender is governed by the law of the forum, certainly plaintiffs would not have to make any tender at any time. So certainly the opinion of the Court must be modified on rehearing, unless the Court still says that the question of tender is governed by the law of California. We submit that inasmuch as no tender was required under the Arizona cases and even under the California cases, including the celebrated case of *O'Meara v. Haiden,* the case should be affirmed on rehearing.

Remember this well, it makes very little difference what happens in the case so far as the defendant is concerned; its buses will keep rolling. And by this we do not mean to say that if there is fundamental error in this case, the case should not be reversed, but we say that the record fails absolutely to show such error. If the defendant thought that it was prejudiced by any instruction, it should have required a special finding; and having failed to do so, it should now not complain. We do not wish to be evangelical or pontifical, but we believe that the record shows that the plaintiff at the beginning of the war had started to California to get a job at a war plant, and had one of her children with her. In one breath her body was mangled and her leg had to be amputated below the knee, due to the admitted negligence of the defendant and due to the brutal, wilful, criminal negligence of the defendant she was made a hopeless cripple for life, because of the wilful negligence of its agents and servants. Remember this well, that the plaintiff Zoa H. Zane will be compelled the rest of her life to go around on crutches with a bodily injury where she will suffer intense pain the rest of her natural life, and at best it is little reward that the jury did give her. The defendant even complained of the money that Zoa H. Zane spent for taking care of her children while her husband was in the Navy. This is somewhat of a paradoxical reward for patriotism.

We submit that if the fundamental law is that the question of tender was governed by the law of Arizona, which we think it is, that there is not a scintilla of error in the record and the case should be affirmed promptly on rehearing; or if the Court has any doubt about the legal phases of this case, it should grant a rehearing and permit further argument.

We do not think that the plaintiff should be saddled with a cost bill of nearly $1200 on this record. May we kindly suggest that the Greyhound has had its day in court and that there is no fundamental error in the record, and let it go its way and sin no more. We believe under the new Rules and under the fundamental theory of the law that this case is entitled to be affirmed, and like the biblical saying of old, "The letter of the law killeth, but the spirit of the law giveth life."

We submit that the appellant should be granted a rehearing in any case.

Very respectfully submitted,

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CERTIFICATE OF COUNSEL ON REHEARING

We, the undersigned attorneys for the appellees in this cause, do hereby certify that in our judgment the Petition for Rehearing is well founded and that in our judgment it is not interposed for the purpose of delay.

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Petition to Stay Mandate

In order for plaintiffs to apply for writ of certiorari to the Supreme Court of the United States.

Comes now, Zoa H. Zane and Jack Zane, plaintiffs in this action and petitions the honorable Circuit Court of Appeals for a stay of the mandate in said cause if the plaintiffs' petition for rehearing is denied until the plaintiffs can apply to the Supreme Court of the United States for a writ of certiorari, and said petition is based upon the following grounds:

I.

That, we believe that the honorable Circuit Court of Appeals has rendered decisions in conflict with other Circuit Court of Appeals in construing the Federal Rules of Civil Procedure in holding that the plaintiffs' theories of the case were inconsistent, and we believe said decision

is in conflict with *Fidelity Deposit v. Krout,* C.C.A. 146 F.2d 531; *Reconstruction Finance Corporation v. Goldberg,* 143 F.2d 752, and in doing so, has decided an important federal question of law that we believe has not been settled by this court.

II.

And, for the further reason, that the honorable Circuit Court of Appeals erred in holding that the law of California governed as to the matter of tender or rescission, when in truth and in fact the law of Arizona, the law of the forum, governed. And it was not necessary for the plaintiffs to make tender of consideration before instituting suit because the claim on which suit was based was for a separate and distinct injury than for which the release was given, and we believe that if a petition for rehearing is denied, that the mandate should be stayed until the plaintiffs can apply for a writ of certiorari to the Supreme Court of the United States.

CERTIFICATE OF COUNSEL ON PETITION TO STAY MANDATE

We, the undersigned attorneys for the appellees in this cause, do hereby certify that in our judgment the petition to stay mandate is well founded and that in our judgment it is not interposed for the purpose of delay.

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